



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF V-M-H-

DATE: JUNE 21, 2016

**CERTIFICATION OF TEXAS SERVICE CENTER DECISION**

**APPLICATION: FORM I-485, APPLICATION TO REGISTER PERMANENT RESIDENCE  
OR ADJUST STATUS**

The Applicant, a native and citizen of India, seeks to adjust status to that of a lawful permanent resident as the child of a principal adjustment applicant who is the beneficiary of an approved employment-based immigrant petition. *See* Immigration and Nationality Act (the Act) section 245, 8 U.S.C. § 1255. Under section 245 of the Act, a foreign national may apply to change status from nonimmigrant (or parolee) to immigrant status if a visa is immediately available, the foreign national has been inspected and admitted or paroled into the United States, and he or she is able to meet all of the required qualifications for permanent residence, including a favorable exercise of discretion.

The Director, Texas Service Center, denied the application. The Director concluded that in accordance with section 245(a) of the Act and 8 C.F.R. §245.1(a), the Applicant was not eligible for adjustment of status because there was no longer a visa number available for him as a following-to-join derivative after the principal applicant (and beneficiary of the approved Form I-140) became a naturalized U.S. citizen. The Applicant filed a Form I-290B, Notice of Appeal or Motion (motion to reopen and a motion to reconsider) that decision. The Director denied that motion. The Applicant filed a subsequent Form I-290B moving for reconsideration of that decision and that motion was denied pending certification for our review.

The matter is now before us on certification. On certification, the Applicant states that the naturalization of his father, the principal beneficiary on the approved Form I-140 that was the basis for the Applicant's application for adjustment of status, does not cut off the Applicant's ability to adjust status as a following to join derivative based on the Form I-140. The Applicant also states that section 203(d) of the Act governs his case and that the statute places "[a] spouse or child" of an employment-based immigrant who is "not otherwise entitled to immigrant status and the immediate issuance of a visa" in the shoes of the principal alien, making them "entitled to the same status, and the same order of consideration" as the principal alien, "if accompanying or following to join the spouse or parent." The Applicant states that the statute provides that the Applicant is entitled to the same priority date as his father under his father's approved Form I-140. The Applicant further states that he is protected under the Child Status Protection Act (CSPA) and the priority date from his father's Form I-140 "is still viable for transfer to link it with the I-130 for direct approval."

We will affirm the initial decision of the Director, Texas Service Center, dated September 17, 2013, and deny the application.

## I. LAW

The Applicant seeks to adjust status to that of a lawful permanent resident under section 245(a) of the Act, which provides:

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the [Secretary of Homeland Security], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

Furthermore, section 203(d) of the Act provides:

A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 1101(b)(1) of this title shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

## II. ANALYSIS

The Applicant asserts that, as a following-to-join beneficiary, section 203(d) of the Act accords him the same status received by his father, who adjusted to lawful permanent resident status on June 5, 2007, regardless of his father's subsequent naturalization. The Applicant also contends that he retains this following-to-join status despite his 29 years of age, as he is still considered a child for the purposes of his father's approved Form I-140 under the CSPA.

### A. Adjustment of Status and Following-to-Join Children in the Act

Section 245(a) of the Act indicates that two requirements for adjustment of status under section 245 are that an applicant is eligible to receive an immigrant visa and that an immigrant visa number is immediately available. Section 203(d) of the Act states that a following-to-join child is entitled to the same status as the primary beneficiary. *See Matter of Estrada*, 23 I&N Dec. 180, 187 (BIA 2013). As section 203 of the Act refers to the allocation of immigrant visas, section 203(d) pertains to the adjustment of status of accompanying or following-to-join beneficiaries to the same status as the primary beneficiary of the visa petition. The Applicant's father is no longer a lawful permanent resident, as he naturalized on November 6, 2009. In order for the Applicant to obtain the same status

as his father, he would have to obtain citizenship. However, section 203(d) of the Act does not apply to naturalization and the Act does not otherwise allow for following-to-join on naturalization applications. The question, therefore, is whether the Applicant retains eligibility for the same status as that previously held by his father, or in other words is a visa still available to him pursuant to the FAM or does the CSPA allow for his adjustment. Both of those questions are addressed below, with the result being that a visa is not available to the Applicant at this time and he is no longer protected by the CSPA.

#### B. Allocation of Immigrant Visas and Following-to-Join Children in the FAM

A visa number was no longer available to the Applicant as a following-to-join derivative of an employment-based, third-preference immigrant petition, after the naturalization of the beneficiary of the Form I-140. The regulation at 8 C.F.R. § 245.2(a)(5)(ii) indicates that an application for adjustment of status for a preference applicant shall not be approved until an immigrant visa number has been allocated by the U.S. Department of State (DOS). As the DOS has jurisdiction over the allocation of the Applicant's visa, and the approval of his Form I-485 is dependent upon this allocation, it is appropriate for us to look to the provisions of the FAM in assessing the Applicant's eligibility to adjust status. *See* section 203(e)(2), (3) of the Act. In applying for adjustment of status, the Applicant sought the allocation of an immigrant visa number from the DOS as an employment-based, third-preference immigrant. DOS states at 9 FAM 503.2-4(A)(f) that when a principal applicant becomes a naturalized citizen, the principal alien should file a relative petition for the family member who was previously a following-to-join beneficiary. As such, in accordance with the FAM, upon the Applicant's father's naturalization on June 14, 2012, the Applicant was no longer eligible for following-to-join benefits and the appropriate avenue for seeking adjustment of status became as a beneficiary of a family-based petition, the Form I-130 filed by Applicant's father on the Applicant's behalf on June 3, 2013.

Because DOS would no longer allocate an immigrant visa number to the Applicant as an employment-based, third-preference immigrant, he is ineligible to adjust status based on the prior approved Form I-140. Moreover, the priority date is not yet current on the Applicant's family-based Form I-130 petition filed on his behalf by his father. *See* U.S. Dep't of State Visa Bulletin, Vol. IX, No. 90 (Mar. 2016).

#### C. The Child Status Protection Act

The Applicant's argument that he remains eligible pursuant to the CSPA does not accurately reflect the remedy provided by the provisions of that Act. The CSPA is meant to protect derivative children who age-out during the pendency of their applications for adjustment of status where the application remains pending due to administrative delays. If an applicant is protected by the CSPA, they will legally remain under 21, even after they turn 21 years of age, and remain eligible for the same visa petition priority date as their parent, if certain conditions are met. The formula for calculating the age of a child, and determining whether the child is covered by the CSPA, is found at section 203(h)(1) of the Act and generally provides that for the purposes of the CSPA, age is determined by

the age of the derivative beneficiary on the date on which an immigrant visa number becomes available for their parent reduced by the number of days during which the applicable petition remains pending.

Even assuming the Applicant remained a child under the CSPA for purposes of the approved Form I-140, the naturalization of the Applicant's father rendered the applicant ineligible for allocation of a visa number in the employment-based, third-preference category. The Applicant can establish eligibility for allocation of a visa number in the family-based, first-preference category. The Applicant states that he should be able to retain the original Form I-140 employment-based, third-preference category visa petition priority date and apply it to the new family-based, first-preference category. However, this remedy, where provided, is limited, and it is not available for the transition from an employment-based to a family-based petition. For example, 8 C.F.R. § 204.2(a)(4) allows for the conversion of certain family-based petitions from one category to another, allowing a child to remain protected once his or her parent's status changes through naturalization, but this is limited to situations where the parent was the original petitioner. Here, the original petitioner was the Applicant's father's employer, and there is no provision under the CSPA that allows for the conversion of a petition in which the petitioner does not remain the same.

Additionally, within the family-based context, the Board of Immigration Appeals (the Board), in *Matter of Zamora-Molina*, 25 I&N Dec. 606, 610-611 (BIA 2011), determined that a second-preference family-based applicant who converted to the first-preference category upon the naturalization of his mother could not transfer CSPA child status from his prior category.<sup>[1]</sup> As the applicant in *Zamora-Molina* could not transfer CSPA child status, he was not eligible for classification as an immediate relative, as he was 22 years of age at the time of his mother's naturalization. *Id.* The record reflects that the Applicant was over 21 years of age on June 14, 2012, the date on which his father submitted a Form I-130 on his behalf. Further, the Supreme Court, in *Scialabba v. Cuellar de Osorio*, 134 S.Ct. 2191 (2014), held that priority date retention for CSPA purposes applies only to aged-out derivative beneficiaries who qualify or could have qualified as principal beneficiaries upon automatic category conversion, without seeking a new sponsor/petitioner. The Applicant, as an unmarried child over 21 who does not qualify for automatic category conversion, can neither be categorized as an immediate relative of his naturalized father for Form I-130 purposes nor retain the priority date of his father's approved Form I-140. *See generally* USCIS Policy Memorandum PM-602-0118, *Updated Guidance to USCIS Offices on Handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Following the Supreme Court Ruling in Scialabba v. Cuellar de Osorio* (June 25, 2015), [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/20150625\\_Post\\_Cuellar\\_de\\_Osorio\\_PM\\_Effective.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/20150625_Post_Cuellar_de_Osorio_PM_Effective.pdf).

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<sup>[1]</sup> The Board noted that section 201(f) of the Act establishes rules for determining whether aliens are immediate relatives. *Id.* According to section 201(f) of the Act, the determination of whether an alien satisfies the child requirement for immediate relative status is based on the alien's: 1) age on filing of the immediate relative petition, 2) age on parent's naturalization date in the case of a petition initially filed for an alien child's classification as a family sponsored immigrant under section 203(a)(2)(A), or 3) age on marriage termination date.

D. Discretion

As the Applicant has not demonstrated eligibility under Section 245 of the Act, we need not consider whether the Applicant warrants adjustment of status in the exercise of discretion.

III. CONCLUSION

The Applicant has the burden of proving eligibility for adjustment of status. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. An immigrant visa is no longer available to the Applicant as a following-to-join beneficiary under section 203(d) of the Act, nor is a visa available to him in the first preference family based category. As a visa is not immediately available to him, the Applicant is currently ineligible to obtain lawful permanent resident status under section 245 of the Act.

**ORDER:** The initial decision of the Director, Texas Service Center, dated July 15, 2015, is affirmed, and the application is denied.

Cite as *Matter of V-M-H-*, ID# 15231 (AAO June 21, 2016)